

Freedom of Information Bill, 2013

**Proposals for
Reform of FOI Fees**

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1. Purpose of Paper

1.1 This paper:-

- outlines the current FOI fees regime in Ireland;
- sets out the background to the issue of FOI fees;
- summarises the international position in relation to FOI fees;
- examines the case for the reform of FOI fees; and
- sets out the Minister's proposals on FOI fees which will be introduced at Report Stage of the FOI Bill in the Dáil.

2. Introduction to FOI Fees

2.1 FOI fees in Ireland currently essentially comprise:-

- The 'upfront' €15 application fee introduced in 2003 payable only in respect of non-personal FOI requests (which comprise about 3 in 10 FOI requests); and
- Search, retrieval and copying (SRC) fees provided for in the original 1997 legislation and levied at €20.95 per hour in respect of the cost of public servants' time in search for and retrieval of records falling within the scope of an FOI request that are ultimately released. SRC fees are not charged for records that are withheld;
- The €75 fee for an internal review and the €150 fee for an appeal to the Information Commissioner

2.2 SRC fees cannot be charged either for the time expended that relates to records that are found to be exempt from release or for the time spent in deciding what records falling within the scope of an FOI request are eligible for release under the Act. The current hourly SRC fee is estimated by the Central Economic and Evaluation Services in the Department of Public Expenditure and Reform to underestimate the cost of a public servants' time by approximately 50%.

2.3 The average total level of FOI fees payable in respect of a non-personal FOI request was €21.59 in 2011 comprising the application fee of €15 and the average level of SRC fees paid of €6.59. The average amount of search and retrieval time charged amounted to less than 20 minutes.

2.4 This average total amount comprises less than 5% of the average estimated administrative cost of €600 in the total cost of dealing with a FOI request when account is taken of the full cost of a public servants' time as well as the time spent in deciding on the request, in addition to the time spent searching for and retrieving the records that are the subject of the request. The estimate based on survey data for 2010 relates to both personal and non-personal requests; the average total cost of a non-personal request, which are in general more complex, is therefore likely to be substantially higher. No application fee or SRC fees apply for personal FOI requests, except in exceptional circumstances.

2.5 Two key conclusions can be drawn:-

2.5.1 Non-personal FOI requests give rise to significant administrative costs across the public service as a whole. A large increase in the number of non-personal requests would lead to a substantial increase in these administrative costs which could impact adversely on the capacity of the public bodies to carry out other statutory responsibilities.

2.5.2 FOI fees do not accurately reflect the overall administrative cost of dealing with requests. However, a very substantial increase in the overall level of FOI fees would be required to recoup a meaningful proportion of the total administrative cost for non-personal requests. For example, a 30% cost recovery target would require a large increase in FOI fees for the average non-personal request amounting to approximately €180.

3. Background to FOI Fees

3.1 At the time that SRC fees were initially put in place under the original 1997 FOI legislation, it was envisaged, as illustrated in the debate in the Oireachtas at the time, that these charges would only arise in cases where a person was looking for a substantial volume of material that created a significant administrative burden in a well organised office. In such cases it was believed that the requester should pay such fees because their request would disrupt the daily business of that office impacting adversely on the services provided by that office to the public. SRC fees therefore recognised the opportunity cost of public servants' time when responding to FOI requests.

3.2 The 2003 legislation maintained the SRC fees provided for in the original legislation but amended the legislation in relation to fees to permit the Minister for Finance to prescribe a fee to be charged by a public body in respect of a request for access to non-personal records. The amending legislation provided for the 'upfront' application fee on the basis that:-

- There was a very significant administrative cost to Freedom of Information that should be recognised, which in some cases could be significant and was borne by taxpayers generally;
- The provisions for the charging of (search and retrieval) fees in the original Act had not operated as was originally intended;
- The absence of any application fee facilitated 'trawls' through the records of Government Departments, often by journalists, which was not in keeping with the original objective and spirit of the Act, had little or no public benefit and diverted administrative resources away from other priorities.

3.3 The main arguments put forward in favour of the introduction of the application fee for non-personal FOI requests at the time, therefore, related to requiring some notional contribution towards the administrative cost of FOI and to deter misuse of the legislation in light of the negative consequences on the ability of the relevant public bodies to carry out their work on account of the volume of FOI requests.

3.4 The introduction of an application fee for non-personal FOI requests was represented as requiring requesters to focus and target requests for information under the Act. The level of €15 at which the application fee was set was described as striking a balance between the significant cost of administering the legislation and the objective of facilitating access by the public to official information.

3.5 In conclusion, the upfront application fee was introduced in 2003 essentially for the same reason as underpinned the inclusion of SRC fees in the original 1997 legislation. No assessment appears to have been carried out at the time to assess why SRC fees had not succeeded in promoting targeted and focused FOI requests and in discouraging misuse of FOI. In addition, the effect of introducing an upfront application fee in discouraging FOI requests that were in the public interest does not appear to be factored into the analysis of costs and benefits of FOI.

4. International Position – FOI Fees

4.1 International analysis highlights that controversy regarding FOI fees is ubiquitous. The principle is universally accepted that where FOI fees are applied they should not discourage requests for access to official information. Practically all FOI type legislation provides for the ability to levy some charges for locating and/or reproducing records but there is wide diversity between the approaches adopted in different national FOI laws.

4.2 FOI fees – usually but not exclusively in the form of search and retrieval fees – are a common feature of FOI regimes internationally. According to the Global Right to Information Rating www.rti-rating.org all 33 of 34 OECD countries which have FOI type legislation in place, provide for the charging of some FOI fees even if in some instances these are restricted to the cost of reproduction. 18 OECD countries, including Ireland, charge search and retrieval fees but only 3 others charge application fees for FOI (i.e. Canada, Japan and Israel). A wider group of 15 countries¹ out of the 95 countries worldwide included in the ratings charge application fees. While a small number of jurisdictions charge no fees for FOI whatsoever, an entirely free FOI regime tends to be the exception rather than the rule internationally. Details of the international position on FOI fees in a number of countries is attached as Annex 1 to this paper.

4.3 The question of FOI fees and charges have been examined in a number of countries, for example in the UK and Australia. A number of issues highlighted in those reviews are briefly summarised below given their relevance for the examination of the position in Ireland and the development of proposals for reform.

4.4 Australian Review of FOI Fees.

4.4.1 In the February 2012 report *A Review of Charges under the Freedom of Information Act, 1982* the Australian Information Commissioner focussed on the objectives for FOI of promoting greater transparency in government by providing the community with access to government information to support accountable and responsive government. The review highlighted the following issues in particular:

- FOI requests can impose a substantial administrative burden on agencies. While the previous (2010) reforms of FOI fees which in particular abolished an FOI application fee of AU\$30 (€20.40) were successful in delivering low cost access to information for applicants, they also created challenges for agencies in managing increased workloads. Some agencies reported higher costs of processing because the number or complexity of applications had increased. This raised questions about the appropriateness of diverting resources from other key areas to process FOI requests.
- Fees and charges should not be used to discourage applicants from exercising their rights under FOI, nor as a mechanism to seek full cost recovery or to generate revenue for agencies.
- It is appropriate for users to make some contribution to the costs of processing applications as in many cases the costs of processing individual requests can be substantive. Costs should be set at an appropriate level to reflect the type of information sought and the resources of the applicant. An appropriate fees level assists

¹ Canada, China, India, Israel, Japan, Nepal, Pakistan, Tajikistan, Uganda, Uzbekistan, Zimbabwe, Saint Vincent and the Grenadines, South Africa and Taiwan.

in providing a disincentive for unmeritorious or repeat applications and streamlining large or complex requests.

4.4.2 Key recommendations included in the Information Commissioner's review included that:

- agencies should be encouraged to establish administrative schemes to allow people to request information outside the FOI Act and if an agency establishes such a scheme and a person makes a FOI request without first applying under the scheme, a \$50 FOI application fee should apply to both personal and non-personal requests;
- FOI charges for non-personal requests should apply at the same flat rate to all processing activities (search, retrieval, decision-making, redaction and electronic processing); processing time of more than five hours, but less than ten hours should be charged at a flat rate of AU\$50 (€34 approx.). Processing in excess of ten hours should be charged at AU\$30 (€20.40 approx.) per hour;
- an agency should have the discretion to refuse to process a request that is estimated to take more than 40 hours to process whether personal or non-personal.

4.4.3 The response to these recommendations was published in the July 2013 statutory review of FOI and Information Commissioner legislation for the Attorney-General. The report concurred that the administration of FOI represents a significant cost and resource commitment and that a key challenge is to adopt and maintain practices to process FOI requests effectively and efficiently within their resources. While the review acknowledged the desirability of encouraging the use of administrative access schemes, it did not, however, recommend that this should be done by the reintroduction of application fees for FOI requests.

4.4.4 The review endorsed the recommendation regarding the introduction of a 40 hour processing time ceiling for FOI. It also endorsed the recommendation that a flat rate processing charge should apply to all processing activities but recommended that no charge should be payable for the first five hours of processing time, processing time that exceeds five hours but is ten hours or less should be charged at a flat rate of AU\$50 (€34 approx.) and that the charge for each hour of processing time after the first ten hours should be AU\$30 (€20.40 approx.) per hour.

4.5 UK Reviews of FOI Fees

4.5.1 The UK FOI Act 2000 provides that public authorities can either charge for or decline requests for information that would cost a public authority either more than £600 (€740 approx.) for central government or £450 (€560 approx.) for other public authorities to deal with the request. This is referred to in the UK legislation as the appropriate limit.

4.5.2 In calculating whether the cost limit would be exceeded by complying with a request, a public authority may, under the regulations, only factor in the costs involved in determining whether it holds the information, locating the information, retrieving the information and extracting the information. This translates as 24 and 18 hours respectively based on a standard charge of £25 per hour (€31) regardless of the actual cost of the staff time taken.

4.5.3 In 2006 Frontier Economics in a report on the impact of FOI commissioned on behalf of the UK Department of Constitutional Affairs recommended:

- that consideration be given to including reading, consideration and consultation time within the scope of calculating the appropriate limit;
- an increase in the standard charge from €25 to £34 per hour for central government on the basis that it was a more representative cost.
- examination of a targeted fee for commercial, media or repeat FOI requesters.

The Constitutional Affairs Committee disagreed with the report's conclusions on the basis that sufficient weight was not afforded by the report to the public interests in access to information or to the wider benefits of FOI and no changes were subsequently made in FOI fees.

4.5.4 In December 2011, the UK Ministry of Justice submitted a Memorandum to the Justice Select Committee for the Post-Legislative Assessment of the UK FOI legislation. The Memorandum highlighted a number of issues including whether the FOI regime struck the right balance between the Government's commitment to transparency and its commitment to reduce regulatory burdens. FOI has had an impact on resources and the cost to public authorities, with some requests resulting in significant cost. The appropriate cost limit is largely viewed as inappropriate by public authorities who feel either that the limit is too high or that the range of activities which can be included in its calculation are not comprehensive enough.

4.5.5 The Justice Committee's report found that complying with its duties under the Act can be a significant cost to a public body, but it also creates savings which accrue from the disclosure of inappropriate use of public funds or, more importantly, fear of such disclosure. It also indicated that a two hour decrease in the 18 hour appropriate limit may be justifiable. The Committee recognised that while there is an economic argument in favour of FOI being significantly or wholly self-funding, fees at a level high enough to recoup costs would deter requests with a strong public interest and would defeat the purposes of the Act, while fees introduced for commercial and media organisations could be circumvented.

4.5.6 The Government's response to the Committee's report published by the Department of Justice in November 2012 largely agreed with the Select Committee's recommendations recognising that any consideration of the burdens of FOI must also take adequate account of the benefits, both tangible and intangible, rendered through the Act.

4.5.7 The report concluded that:-

- Targeted charging would be difficult and burdensome to enforce and police.
- Charging for FOI requests would have an adverse impact on transparency and would undermine the objectives of the Act. A charge would be expensive to administer and may result in increasing, rather than reducing, burdens on public authorities particularly if it were a nominal charge rather than a much higher full cost recovery fee.
- The report also highlighted that the economic situation and increased pressure on the budgets of public authorities means that the Government must also consider how best to reduce the burden of FOI where it can do so without undermining

transparency.

- It also stressed that there are other, non-legislative means of improving the operation of FOI within public authorities and improving the efficiency of handling FOI requests, thereby reducing the burdens
- Efforts to reduce burdens should be focused on those who impose disproportionate burdens on public authorities by making what may be considered as 'industrial' use of the Act.
- Options for providing that time taken to consider and redact information can be included in reaching the cost limit would be explored as will other options to reduce the burden on public authorities in relation to the cost limit including the possibility of reducing the current overall limits of £600 and £450.

4.6 Conclusions

As can be seen from the above examples, fees are a controversial issue in other jurisdictions. Some key conclusions that are relevant to Ireland's situation are that:

- processing of FOI requests impose a substantial administrative burden on public bodies diverting resources away from other important functions particularly where there is a high volume of complex requests;
- these direct administrative costs need to be considered in the context of the increased discipline and efficiency in the use of public funds as well as the substantial savings that can be achieved on account of an effective FOI regime;
- a recognition that the charging of FOI fees is appropriate where a request gives rise to a substantial administrative cost for activities such as identifying and locating records falling under the request;
- consideration should be given to options such as the provision of some uncharged search and retrieval time, imposing a cap above which requests should not be processed and factoring decision-making time into charges,
- FOI supports accountable and responsive government but a simple administrative form of access outside of FOI Acts offers substantial benefits
- Proactive publication of information and Open Data policies are key to a more effective means of providing information on government activities and public administration.

5. Review of FOI Fees by Government – July 2012 and July 2013

5.1 The issue of FOI fees was examined in detail by the Government in the context of agreeing the policy on FOI Reform in July 2012 and was reviewed in advance of the publication of the legislation to reform FOI in July 2013.

5.2 The review recognised that a balance had to be struck between the public interest in ensuring that access to non-personal official records (in respect of which upfront fees were charged) was facilitated and that the FOI regime operated effectively.

5.3 It was acknowledged that the existing FOI fees regime – both SRC and application fees did not result in any meaningful cost recovery and could not, therefore, be justified on financial grounds. However, it was believed very important to also have regard to other relevant factors including:-

- the very substantial reductions in the numbers employed in the public service;
- the significant programme of rationalisation of State bodies;
- the financial and human resources constraints to which public bodies are subject to providing public services;
- the proposed extension of Freedom of Information to all public bodies and those significantly funded by the State;
- the resources and capacity available to the Office of the Information Commissioner in processing Freedom of Information appeals to the Information Commissioner

5.4 The Government agreed in July 2012 that there was a real risk that abolition of the application or indeed all FOI fees would be likely – against the backdrop of the extension of FOI and in the absence of the significant and sustained enhancement across the board in the management of Freedom of Information requests – to have the potential to create very significant administrative pressures for public bodies to the point that priority and/or frontline public services would be adversely affected by the diversion of public servants time to dealing with a substantial increase in non-personal FOI requests.

5.5 In that context, it was also believed that a situation in which the administrative system and/or particular high-profile public bodies discharging significant responsibilities in relation to the provision of key public services came under excessive administrative strain on account of abolition of fees, could cause serious damage to the credibility and reputation of Ireland's Freedom of Information regime

5.6 Government, therefore, agreed to retain the application fee:-

- to promote focused and targeted FOI requests and
- to guard against an excessive administrative demand being generated by FOI in an environment where staffing resources in public bodies are very constrained.

- to act as a filter - avoiding risk of FOI becoming the default option – i.e. provide an incentive to look for information elsewhere first
 - to reinforce the important message that there are substantial opportunity costs measured in terms of public servants' time in dealing with FOI requests.
- 5.7 In conclusion, it is clear that the main elements of the case for the retention of FOI application fees as set out above that underpinned the approach taken in the published Bill closely reflect the concerns raised in the reviews of FOI regimes discussed in Section 4 of this paper. The central issue to be considered is whether other available options to address these issues, other than through the maintaining of the application fee for non-personal FOI requests, could be effective in securing the desired outcomes in this area without impacting adversely on the public's ability to access official information.

6. Proposed Reductions in Internal Review, Appeal and SRC Fees

6.1 In assessing priority for reform of FOI fees generally, the Government decided, on the Minister's advice in July 2012, that the introduction (in 2003) of prohibitive fees for internal review and appeal cases to the Information Commissioner (i.e. €75 and €150 respectively) represented a serious impediment to ensuring the effective operation of the FOI system overall.

6.2 The evidence was that the introduction of high appeal fee levels has acted as a very strong disincentive to applications for both internal reviews and appeals by requesters who are dissatisfied with the decision-making of public bodies. The consequent diminution in oversight and scrutiny by the Information Commissioner of the implementation of the legislation by public bodies is unlikely to have a positive effect on the quality of decision-making or the extent to which decision-makers would apply key balancing tests, in particular relating to the public interest favouring release.

6.3 The very substantial reductions agreed by Government in the level of these fees to €30 and €50 (in the case of internal review and appeal fees respectively) was therefore, a core element of the overall package of the Government's FOI reforms.

6.4 In revisiting the issue of FOI fees in July 2013 in light of the pre-legislative scrutiny report prepared by the Joint Oireachtas Committee on Finance, Public Expenditure and Reform the Government agreed, on the Minister's recommendation, to the proposal that the first two hours of search, retrieval and copying time on records released under FOI should be provided free of charge and a cap of €500 should be imposed on the total level of SRC fees charged by public bodies.

6.5 These proposals were introduced through amendments tabled by the Minister at Committee Stage for the Bill. In particular the proposal not to charge for the first two hours of search, retrieval and copying time for records released under FOI which would otherwise in principle give rise to search and retrieval fees in excess of €40 was in recognition in part of the existence of the upfront application fee for non-personal FOI requests of €15.

6.7 The proposals for reform of FOI fees introduced at Committee Stage drew on the experience of other jurisdictions in, for example:-

- seeking to reduce high application fees for internal review and appeal which are likely to discourage full use and more effective operation of the FOI regime
- removing search and retrieval fees for requests that do not give rise to a significant administrative burden for public bodies;
- setting a cap on search and retrieval fees to preclude the scope for excessive estimates of search and retrieval fees given the proposed strengthening of the provision to refuse requests on the grounds that they are voluminous.

6.8 The Minister's decision to withdraw all amendments relating to FOI fees at Committee has provided the opportunity for a 'root and branch' review of FOI fees taking into account international evidence as well as the proposals for reform introduced at Committee Stage.

7. FOI Fees: Assessment of Options

7.1 In terms of public debate, a major point of contention from the very beginning of the process to reform the FOI Act was whether or not there should be a charging system for accessing information; and if there was to be a charging system, the format it should take.

7.2 Fees and the ability to levy fees, have been a feature of the FOI system in Ireland since it was first put in place. As set out in section 2 of this paper, the 1997 Act (which did not contain an up-front application charge), provided for a search, retrieval and copying fee (SRC) system that imposed a charge in recognition of the actual cost involved in the retrieval of information under the legislation.

7.3 There is, in principle, merit in the contention that there should be no application fees or indeed no fees of any kind for FOI requests given the undoubted benefits of FOI. Many examples can be highlighted where the use of FOI and the transparency it has engendered has played an important role in identifying and helping to prevent waste and inefficiency in the use of public funds. However, the practical day-to-day operation of FOI does involve a real cost to the public bodies concerned. The information summarised in Section 4 and Annex 1 of this paper reflects this reality as it confirms that relatively few countries have chosen to fully apply the policy of no FOI fees in practice.

7.4 In addition to the international precedent, there are particular current realities that pertain in Ireland, that need to be taken into account in assessing the issue of FOI fees. The State's current difficult fiscal position cannot be discounted. In what remains a severely constrained fiscal environment in which public service numbers have been substantially reduced, the provision of public services is subject to strict budgetary limitations and a broad range of benefits to citizens have had to be curtailed and user-charges have had to be introduced or increased in several areas.

7.5 Another critical element of the assessment of this issue relates to the impact of the elimination of FOI fees on the ability of public bodies to operate effectively and carry out their primary responsibilities as well as to deal with their responsibilities under FOI legislation. In terms of the latter, a particular priority relates to the need to safeguard public bodies' operational performance in respect of FOI in order to underpin the credibility of the freedom of information regime in Ireland overall, in terms of the risk that the elimination of all FOI fees would generate a very sharp increase in FOI requests and the volume of information sought that would overwhelm the capacity of the administrative system.

7.6 In order to help secure Ireland's fiscal sustainability there has been a reduction of approximately 30,000 in public sector numbers. The proposed extension of FOI is expected to automatically comprehend in the region of another 70 public bodies in addition to the 500 approx. public bodies already subject to the Act. It is also the Government's intention to bring bodies which are significantly funded by the Exchequer within the provisions of the FOI legislation. There is an evident risk that the abolition of all fees could create a marked imbalance between the number of FOI requests received or volume of

information sought as compared to the capacity of the administrative system to deal with FOI requests.

7.7 Providing for charges signals the existence of the costs involved in providing the FOI service. If FOI fees were abolished in full, the absence of any incentive for a FOI requester to recognise that there are costs to processing FOI requests has a clear potential to lead to a very substantial increase in FOI requests and the extent of the information sought. This would ultimately culminate in a situation that public bodies would not have the administrative capacity to deal with the overall number of requests without impacting in a substantial way on their ability to properly discharge other important roles and responsibilities. This opportunity cost relates to the time that public servants spend in dealing with FOI requests rather than in carrying out their primary role and responsibilities in relation to the provision of public services.

7.8 In the above circumstances it would not be tenable that non-personal FOI requests should no longer require the payment of fees whatsoever particularly given the substantial cost to public bodies borne by taxpayers at large in processing non-personal FOI requests.

7.9 Clearly in circumstances that no fees were charged, the ability of the administrative system to effectively deal with the increased volume of FOI requests, and the increased volume of information sought in such requests that might be expected to arise, would potentially be severely compromised, and this would undercut the objective and benefits of the FOI reforms which the Minister is proposing. Given this and the use of SRC fees in many jurisdictions, the case is strong for retaining some method or combination of methods for encouraging the refinement of requests or indeed removing the need for requests if the system is expected to continue delivering effectively and to a high standard.

7.10 The actual total amount of FOI fees collected by public bodies only constitutes a small percentage of the total economic cost of dealing with FOI requests. Indeed there is an administrative cost to collecting and processing the fees and it is not clear that there is any net gain to the State in direct monetary terms. FOI fees were never intended as a full cost-recovery mechanism. The low nominal application fee for non-personal requests which has remained unchanged since 2003 together with the SRC charge was intended to ensure that Ireland's FOI regime operated effectively and that public bodies could meet their statutory obligations as set out in FOI legislation.

7.11 The evidence suggests however that the current fees system is not achieving its objective – SRC fees are rarely applied, with data for the first nine months of 2013 showing that SRC fees were applied by public bodies in only 5% of cases. There is clearly scope for more effective use of the SRC fees to limit the volume of information sought in particular requests to more reasonable limits.

7.12 This is evidenced in the UK system as seen in section 4 where there is no up-front fee and no search and retrieval charges unless above a certain threshold, and that threshold acts as a disincentive to requestors to seek voluminous requests. On the contrary, in the UK, public bodies refuse to process requests unless requestors refine their requests to bring them within the threshold and voluminous requests are no longer an issue. The Australian regime applies fees for processing requests (including decision-making time) and also applies caps above which requests including personal requests need not be processed.

7.13 The review of the international position shows that Ireland is an outlier amongst EU countries in having an up-front application fee. Indeed as set out in section 4, only 15 countries out of 95 have such a fee, and none of these are EU members. Australia had introduced a fee after some years of implementation but subsequently removed it again and the UK considered it but decided against it. Other countries appear to rely on search and retrieval fees to ensure the FOI system operates effectively and efficiently.

7.14 Based on the very limited use of SRC fees in Ireland, there is scope to use SRC much more effectively and consistently across the public sector to achieve the objective of the focusing and targeting of FOI requests such that generate excessive and disproportionate administrative demands on public bodies.

7.15 On the basis of the above analysis, as well as the international position, the removal of the up-front application fee and revision of the SRC fees to encourage requesters to target or refine their requests appears, in all the circumstances, to be the preferred option.

7.16 Removal of the up-front fee would be in line with the Programme for Government commitment to reverse the amendments introduced in 2003 which included the introduction of the application fee. It is also in line with the Government's overall objective of achieving greater transparency and openness, and its recognition of the potential of FOI to achieve greater openness, transparency and accountability in decision-making. It would bring Ireland in line with other EU countries and would be in keeping with the spirit and objectives of the 1997 Act.

7.17 The removal of FOI application fees will lead to an increase in the number of requests. On the basis that the introduction of the application fee led to an estimated 50 per cent reduction in non-personal requests, the volume of non-personnel requests could be projected to double from its 2012 level of 4,971. This may, however, represent an over-estimate given the number of separate requests that are currently submitted as multifaceted requests to avoid payment of multiple application fees.

7.18 The Minister's assessment is that the implementation of a Code of Practice for FOI will strengthen the efficiency and effectiveness of the FOI regime in public bodies, together with the reform of the fee system to encourage more focused and targeted requests, as well as the legislative changes to better enable public bodies to deal with voluminous FOI requests, will ensure that the removal of the upfront application fee will not have a seriously detrimental impact on the operation of FOI in Ireland. Other actions such as the promotion of proactive publication of official information through the introduction of publication schemes under FOI, the transposition of the revised EU Directive on the Re-use of Public Sector Information and the Open Data initiative would also be expected to lead to a reduced reliance on FOI as the main mechanism to access official information.

8. Proposals for Reform of FOI Fees Regime

8.1 In light of the assessment above, this section sets out the Minister's proposals for the reform of FOI fees, building on the amendments introduced at Committee Stage last November and those included in the published Bill to be achieved through the amendments introduced at Report Stage in the Dáil shortly.

8.2 The main elements of the reform are as follows:-

- Remove the €15 application fee.
- Introduce a cap on search retrieval and copying fees (SRC) at €500 (25 hours)
- Introduce a further limit on estimated SRC fees at €700 (35 hours) above which an Freedom of Information (FOI) body could refuse to process a request (or if the requester agreed, the request could be processed with full SRC fees applying)
- Introduction of a minimum threshold of €100 (5 hours) below which no SRC fees would be charged; if SRC are above this level the full cost would apply subject to the cap of €500
- Retention of the deposit requirement in cases where estimated SRC charges exceed the minimum threshold
- Retention of the ability to reduce or waive charges in certain circumstances
- Reduction in the fees for reviews and appeals.
- Multi-faceted requests will be addressed through the power in the Act to refuse requests on administrative grounds (see Section 9 below).
- Introduction of a definition in the Bill to ensure that there is clarity on the activities for which SRC fees can be applied which includes all activities carried out leading up to the finalisation of a file containing the records for review by the decision-maker prior to release.
- Requests for personal information (70% of requests) will continue to be free except in very rare cases where the grant relates to a significant number of records.

8.3 The proposed introduction of a minimum threshold of €100 (5 hours) below which no SRC fees would be charged should encourage requesters to focus and target their requests to benefit from no charges. It should also ensure that fees would apply only to a relatively small proportion of non-personal FOI requests where the information sought is extensive and/or the requester has been unwilling or unable to refine or focus the request culminating in a situation where there is a very substantial processing requirement for public bodies. This approach would be consistent with the aim of SRC fees in the original legislation.

8.5 A survey (based on 2,460 FOI requests over the first three quarters of last year) showed that setting the threshold for application of SRC fees at this level would result in the majority of requests no longer incurring the charge. The results indicated that the average SRC fee, in cases where SRC fee was levied, was just over €130 and that just over 45% of cases incurred a charge in excess of €100. The proposed substantial level of uncharged search, retrieval and copying time should, therefore be sufficient to ensure that all reasonably focused requests can be processed without incurring SRC fees.

8.6 It has also been decided to retain the proposal to introduce a cap on search retrieval and copying fees that can be charged by public bodies at €500. This amounts to approximately 25 hours of search, retrieval and copying time that can be levied which may in practice require a considerably higher amount of time to be spent searching for and retrieving records on account of the legal prohibition on charging search and retrieval fees in respect of records that are not ultimately released.

8.7 In order to help address the issue of voluminous requests, it is being proposed to provide that if the estimate of the cost of search retrieval and copying exceeds €700 (approx. 35 hours), the public body has the option either of refusing the request on administrative grounds having worked with the requester to seek to refine the request to reduce the estimate below €700 or processing the request but charging the full cost of search and retrieval providing the actual charge for the request exceeds €700. This is intended to discourage 'trawls' of records with nothing specific in mind which can be extremely time consuming to process and to encourage instead more focused and specific FOI requests.

8.8 It is also very important to note that the FOI legislation continues to provide that the charges could be waived on one or more of the following grounds:-

- Where the administrative and related costs involved in collecting a fee on foot of a request were likely to exceed the fee itself;
- Where a person of limited means was seeking only personal information relating to him/herself;
- Where some or all of the information involved would be of particular assistance in understanding an issue of national importance.

8.9 Taken together, the package of proposals for the reform of Ireland's FOI regime are believed to represent a fair and equitable balance between maximising the level of access to information for citizens while maintaining the ability of public bodies to deliver services, including FOI services, in an efficient and effective manner. They are also complementary with a suite of other transparency initiatives including the promotion of the proactive publication of official information, the adoption of publication schedules and disclosure logs, open data and other Open Government Partnership (OGP) commitments.

9. Multi-faceted FOI Requests

9.1 The issue of multi-faceted requests - where multiple FOI requests on entirely separate, distinct and unrelated matters are received – primarily from journalists – as a single request with payment of a single €15 application fee was identified in the context of the development of the FOI legislation as a very significant difficulty in seeking to ensure that the operation of FOI did not give rise to a very onerous administrative burden on public bodies. Multi-faceted requests differ from FOI requests on a specific issue or on related issues containing several different parts.

9.2 This practice had developed since the mid-2000s whereby some requesters would submit a number of separate and unrelated requests as one FOI request, for which only one application fee would be payable. It was not at all unusual for public bodies to receive FOI applications with one fee for €15 but containing up to a dozen separate FOI requests (or even more) on unrelated matters.

9.3 These types of FOI applications gave rise to a disproportionate administrative burden and cost for public bodies and gave rise to a situation that requesters making multifaceted FOI requests were benefitting from preferential treatment relative to other requesters who paid a single application fee for each separate FOI request.

9.4 The objective of the amendment to the FOI Bill introduced at Committee Stage of the Bill to address this issue was intended to secure payment of a fee for each separate and unrelated non-personal FOI request in order to ensure that every non-personal FOI requester was treated in the same way. Subsets or parts of the same question could continue to be included in a single request, the proposal did not require these to be split-up and multiple application fees paid.

9.5 Concerns were expressed at Committee Stage, in the media and by commentators that the amendment would not be interpreted as intended and that rather than the disaggregation of separate, clearly unrelated issues bundled together, requests for subsets of the same issue would be individually charged single application fees. In light of this apprehension, the Minister decided during the debate at Committee Stage to withdraw the amendment relating to multifaceted FOI requests (as well as the amendments providing for two free hours of search retrieval and copying time and the cap on SRC fees) and review the matter with the intention of submitting a revised amendment for Report Stage that would remove any uncertainty and clarify the policy objective of the proposal.

9.6 Subsequently a review has been undertaken of the policy objective, the drafting of the specific amendment as well as the outcome of the internal review by representatives of public bodies and the external review by stakeholders of FOI carried out in summer 2013 on the operation of FOI leading up the preparation of a draft Code of Practice for FOI.

9.7 The External Review Group established by the Minister last year to review the operation of FOI legislation recommended that multifaceted requests which are likely to be voluminous can and should be dealt with under section 15 of the proposed Bill (current section 10) which provides for refusal on administrative grounds (e.g. cause a substantial and unreasonable interference with or disruption of work). In addition, a proper application of the facility to charge SRC fees should discourage multifaceted or voluminous requests

giving rise to an excessive administrative burden on public bodies. Indeed removal of the up-front application fee means there will no longer be a particular incentive for a requester to make a multi-faceted request. Removal of this fee will also support the potential development of a portal in due course similar to those in place in other jurisdictions through which FOI requests could be submitted to aid tracking of requests and responding electronically thus reducing time spent on copying records for release.

9.8 The proposed Code of Practice for FOI is intended to help secure greater consistency in the approach taken in the application of SRC fees. The proposed legal obligation to make publication schemes requiring public bodies to publish official information on an administrative basis outside of FOI, publication of FOI disclosure logs and the implementation of the Minister's Open Data Initiative should mean much more information will be available in the public domain, which would be expected to reduce the requirement for FOI requests (multi-faceted or otherwise) to some extent in the future.

9.9 In the course of the review of the fees regime, updated information was collected on the actual prevalence of multifaceted FOI requests submitted to Government Departments. The information supplied by Government Departments in respect of the first three quarters of 2013 indicated that approximately 15% of non-personal requests could be classified as multifaceted – a lower proportion than the 30% previously reported in 2012²

9.10 The Minister, therefore, has decided, in light of the foregoing, not to proceed with any amendment in relation to multifaceted FOI requests at Report Stage of the FOI legislation. Indeed such requests should become less of a feature in the future given the changes that are proposed in relation to the SRC fees and the removal of the up-front application fee.

² This probably reflects the inclusion of voluminous single requests with multiple parts in the original survey data

10. Conclusion

10.1 The FOI Bill, 2013 is a major step in restoring, updating and reforming Ireland's FOI regime. Consistent and coherent implementation of the legislation underpinned by the operation of the proposed Code of Practice for FOI can make a substantial contribution to increasing the openness, transparency and accountability of public administration in Ireland.

10.2 The proposed reforms to FOI fees set out in this paper are expected to strongly complement the whole thrust of the FOI reform legislation and other key initiatives such as the Open Government Partnership, the planned revision of Re-use of Public Sector Information legislation and Open Data to significantly increase the volume of official information made available to citizens.

10.3 As set out in the table in Annex 2 of this paper, the proposed reforms of FOI Fees levels will lead to a substantial reduction in the total amount of FOI fees compared to the charges currently in force.

10.4 Against the backdrop of the far-reaching reforms included in the FOI Bill and its extension to all public bodies, the proposed new FOI fees regime will assist in more effective management of the number of requests and the volume of information sought. This will strongly complement the new policy direction to proactively publish information widely including information sought routinely under FOI, the introduction of disclosure logs of FOI requests, publication schemes and Open Data policies leading to a major strengthening in FOI in Ireland.

Annex 1 – Research on FOI Fees.

A. Survey of Public Bodies

A detailed survey was carried out of 74 public bodies, 16 of which were Government Departments in respect of the period 1 January 2013 – end-October 2013. The responses covered 2,460 non-personal requests. This is a large sample size as it comprises 48 per cent of the non-personal requests received by public bodies in 2012. The key findings were:

- 47% of the non-personal requests were received by Government Departments
- FOI requests received by Government Departments accounted for 80% of the cases where search and retrieval fees were charged
- 15% of the non-personal applications were multifaceted (with an average of 3.6 parts per request) – the variation in this figure relative to the 30% figure quoted reflects the clearer definition of multi-faceted requests used in this survey. The previous survey probably included single requests with multiple parts.
- The revenue from the associated application fees was over twice the Search and Retrieval fee revenue. This is in line with the trend over the period 2004-2012.
- Search and retrieval fees were only charged in just over 5% of requests
- The overall average search and retrieval fee across all non-personal requests was €6.73
- The average search and retrieval fee in cases where it was charged (i.e. in 126 cases) was just over €130 – representing approximately 6 hours of search and retrieval time
- 47% of all non-personal requests were believed to be from journalists but in the case of Government Departments, journalists accounted for over 65% of non-personal requests. This is in line with historical data which showed that c.50% of all non-personal requests are from journalists.

The main conclusions to be drawn from the results of the survey are that:-

- multifaceted applications comprise a lower proportion of total non-personal requests than previously advised to the Department;
- while there are examples of multifaceted requests containing a very large number of separate requests, the average is 3.6; and
- the search and retrieval fees regime has largely fallen into disuse other than in relation to what appears to be a small number of requests which give rise to a significant level of search and retrieval activity.

A further follow-up survey seeking further details of Search and Retrieval fees charged from Jan 1 2013 to end October 2013, based only on Government Departments showed that:

- The average S&R charged was €141, which was 61% of the initial estimate notified to the requester.
- The average initial estimate notified to requesters is €232 while the average deposit sought is €65.
- 23 requesters paid less than €50, 20 paid between €51 and €100, 23 paid between €101 and €200 with only 13 paying more than €200.
- almost 70% of cases where S&R is charged involve a payment below €140.

In a separate exercise undertaken by the Department based on survey information collected from 26 public bodies on FOI requests in general (i.e. both personal and non-personal) it was estimated that the average cost of dealing with both personal and non-personal FOI requests was approximately €600. The average cost of non-personal requests which are often considerably more complex than personal requests is, therefore, likely to be considerably higher than this estimate of €600.

B. Access to Information Fees Internationally

FOI fees – usually but not exclusively in the form of search and retrieval fees – are in fact a common feature of FOI regimes internationally.

According to the Global Right to Information Rating (prepared by Access Info Europe and the Centre for Law and Democracy) of the 33 (out of 34) OECD countries included in their survey, all of them have provisions to charge some form of FOI fees – however, the Austrian access to information legislation cannot be said to be a FOI enactment.

Apart from Ireland, eighteen can charge search and retrieval fees including for example Australia, the United States, Finland, New Zealand, Poland, Portugal etc. and 3 can charge an up-front application fee for FOI. While worldwide a small number of jurisdictions

charge no fees for FOI, it is noteworthy that the principle of an entirely free fees regime for FOI comprises the exception rather than the rule internationally. The 3 OECD countries, other than Ireland which can impose upfront application fees for FOI requests are: Canada, Israel and Japan³. This indicates that while just over 12.5% of OECD countries with FOI type legislation charge “up-front” FOI fees, charging for search and retrieval fees and copying is the norm.

³ The Japanese legislation simply states that the fee will be calculated on a case by case basis, so as to be as affordable as possible.

FOI Fees in other OECD jurisdictions

Colour Code			
Charges	Partial/Optional charges	Free	
Country	Application	Search & Retrieval	Reproduction
Australia	Free	Search and retrieval fees apply, as do fees for 'decision making and consultation'	Reproduction fees can be charged
Austria	Limited “access to information in law” but no FOI type legislation in place		
Belgium	Free	Free	Fees charged for real cost of copies
Canada	Access fee applies	Search and retrieval fees apply, 50% charged up-front	Reproduction fees can be charged
Chile	Free.	Free	Fees apply to reproduction only.
Czech Republic	Free.	Charge for search and retrieval. Additional fees can also be charged for extensive requests.	Reproduction fees can be charged
Denmark	Free	Free	Fees apply to reproduction only.
Estonia	Free	Free	Fees apply to reproduction only. (First 20 pages free)
Finland	Free	Retrieval charges apply	Reproduction fees can be charged
France	Free	Free	Fees apply to reproduction only.
Germany	Free	Fees can apply beyond copying costs.	Reproduction fees can be charged
Greece	Free	Free	Reproduction cost only
Hungary	Free	Free	Reproduction cost only
Iceland	Free	Free	Reproduction cost only

Israel	Charge to make request	Search and retrieval fees apply	Reproduction fees can be charged
Italy	Free	Free	Reproduction cost only
Japan	Charge to make request	Search fees appear to apply	Reproduction fees can be charged
Luxembourg	No FOI type legislation in place		
Mexico	Free	Free	Reproduction and delivery cost only.
Netherlands	Free	Free	Reproduction costs only. First six copies of document free. Electronic data etc, provided free.
New Zealand	Partial – ministries can demand access fees in advance, can include charges at own discretion	Organisations can charge for time spent locating information.	Reproduction fees can be charged. First 20 pages of documents free.
Norway	Partial – act allows King to make regulations concerning payment. However these cannot exceed reproduction and postage costs	Search and retrieval fees can apply in certain instances.	Reproduction fees can be charged
Poland	Free	Reproduction fees apply & Legislation appears to allow for search and retrieval.	Reproduction fees can be charged
Portugal	Free	Legislation allows bodies to charge for 'services provided' charged at market rate.	Reproduction fees can be charged

Slovakia	Free	Free	Reproduction costs only
Slovenia	Free	Reproduction costs only, other than circumstance where the recipient of the information wants to reuse it for commercial purposes.	Reproduction costs only
South Korea	Free	Reproduction fees apply – can be waived in certain cases 'Administrative fees' apply – only postage costs specified	Reproduction fees can be charged
Spain	Free	Free	Reproduction fees apply.
Sweden	Free	Free	Reproduction costs only.
Switzerland	Free	Search fees can apply. Waived in the case of minimum costs	Reproduction fees can be charged
Turkey	Free	Charge applies for procedure. Interpreted as retrieval costs	Reproduction fees can be charged
UK	Free.	Charges for Search and Retrieval – not levied if less than £600 for Central Gov. or £450 for Local Authorities	Fees can be charged for postage, copying or format transfer.
USA	Free	Charge for search and retrieval after first two hours. First 100 pages free.	Reproduction fees can be charged

Annex 2 – Projected Reductions in FOI Fees.

Hours	Application Fee	Current Search & Retrieval & Copying Fees	Current Total FOI Fees	Proposed Application Fee	Proposed Search & Retrieval & Copying Fees	Proposed Total Fees	Actual Reduction	Percentage Reduction
	€	€	€	€	€	€	€	%
1	15	20.95	35.95	0.00	0.00	0.00	35.95	100.0
2	15	41.90	56.90	0.00	0.00	0.00	56.90	100.0
5	15	104.75	119.75	0.00	0.00	0.00	119.75	100.0
7	15	146.65	161.65	0.00	146.65	146.65	15.00	9.3
10	15	209.50	224.50	0.00	209.50	209.50	15.00	6.7
15	15	314.25	329.25	0.00	314.25	314.25	15.00	4.6
20	15	419.00	434.00	0.00	419.00	419.00	15.00	3.5
25	15	523.75	538.75	0.00	500.00	500.00	38.75	7.2
30	15	628.50	643.50	0.00	500.00	500.00	143.50	22.3
35	15	733.25	748.25	0.00	500.00	500.00	248.25	33.2
40*	15	838.00	853.00	0.00	838.00	838.00	15.00	1.8
45*	15	942.75	957.75	0.00	942.75	942.75	15.00	1.6
50*	15	1047.50	1062.50	0.00	1,047.50	1,047.50	15.00	1.4
55*	15	1152.25	1167.25	0.00	1,152.25	1,152.25	15.00	1.3
60*	15	1257.00	1272.00	0.00	1,257.00	1,257.00	15.00	1.2

*Under proposed fee regime if the estimate of the cost of search and retrieval exceeds €700 (i.e. 30 hours of search and retrieval time), the public body has the option either of refusing the request on administrative grounds having worked with the requester to seek to refine the request to reduce the estimate below €700 or processing the request but charging the full cost of search and retrieval providing the actual charge for the request exceeds €700.